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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 6061.

JACK L. MAYER,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF FOR THE APPELLEE.

ADDITIONAL QUESTIONS PRESENTED.

1. Whether the rule of *Griffin* v. *Illinois* should be extended to grant transcripts at public expense to indigents appealing cases involving no possibility of imprisonment.

2. Whether the rule of *Griffin* v. *Illinois* should be extended to indigent appeals from convictions of petty offenses.

3. Whether *Griffin* v. *Illinois*, 351 U. S. 12 (1956), should be reconsidered.

4. Whether appellant has proven his need for a complete transcript.

ILLINOIS SUPREME COURT RULE INVOLVED.

Effective July 1, 1971, Illinois Supreme Court Rule 607(b), cited in Appellant's Brief (pp. 2, 3), has been amended to read as follows:

"Rule 607. Appeals by Poor Persons.
(As amended July 1, 1971.)

"• • • • • •

"(b) *Report of Proceedings.* In any case in which the defendant is convicted *of an offense punishable by imprisonment for more than six months,* he may petition the court in which he was convicted for a report of proceedings at his trial. If the conduct on which *that case* is based was also the basis for a juvenile proceeding which was dismissed so *that case* could proceed, the defendant may include in his petition a request for a report of proceedings in the juvenile proceeding. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his conviction, and is at the time of filing the petition, without financial means to pay for the report. If the judge who imposed sentence, or in his absence any other judge of the court, finds that the defendant is without financial means with which to obtain the report of proceedings at his trial, he shall order the court reporter to transcribe an original and copy of his notes. The original of the report shall be certified by the reporter and filed with the clerk of the trial court as provided below, and the copy shall be certified by the reporter and delivered to the defendant without charge. The reporter who *prepares* a report of proceedings pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases." (Amendments emphasized.)

ADDITIONAL STATEMENT OF THE CASE.

Since the Appellant's Brief was filed, Illinois Supreme Court Rule 607(b) has been amended, effective July 1, 1971, so as to extend an indigent's right to a report of proceedings at public expense in appeals from felony convictions to appeals from convictions of any offense punishable by imprisonment for more than six months.

Inasmuch as the offenses of which the appellant was found guilty are both punishable by fine only, and not by imprisonment, the amendment does not have any effect on the appellant's personal situation with respect to a free transcript. The amendment does, however, have a bearing on the arguments advanced concerning appeals from convictions of the more serious misdemeanors.

SUMMARY OF ARGUMENT.

I.

This case presents the issue whether the rule enunciated by this Court in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), should be greatly enlarged in applicability. In *Griffin* this Court held that transcripts or other reports of trial proceedings should be supplied at public expense to indigents appealing felony convictions, insofar as such reports are necessary to the adequate presentation of their appeals. In *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), this Court extended the *Griffin* rule to an indigent appealing his conviction of a municipal ordinance violation for which he had been sentenced to imprisonment in jail for a term of 90 days. Now the instant appellant demands that the *Griffin* rule be extended to an indigent appealing his conviction of an ordinance violation which carries no possibility of imprisonment. Appellant demands that he be furnished at public expense a complete verbatim transcript, some 400 pages long, of his two-day jury trial.

Williams v. *Oklahoma City*, 395 U. S. 458 (1969), is not controlling in this case. Under Oklahoma law the filing of a "case made", or record of so much of the proceedings, including testimony, as is necessary to present the issues on review, was a condition precedent to filing an appeal. In *Williams* a transcript had already been written up; the trial judge had made a finding that Williams' appeal was not without merit and that Williams was unable to supply a substitute for the transcript. Yet the trial judge denied Williams use of the existing transcript, thus cutting off his right to appeal.

Illinois has no such requirement and the instant appel-

lant has already filed his appeal in the Illinois Supreme Court.

II.

All the authorities relied on by appellant in his demand, under the Constitution, for a free transcript on appeal, were appeals from sentences to imprisonment or death.

Universal experience in the administration of criminal justice supports the reasonableness of the distinction between offenses punishable by imprisonment or death and offenses punishable only by imposition of a fine. Petty offenses are customarily punished only by fines. The more serious offenses are punished by imprisonment; the most serious, by mandatory prison sentences, or death.

It is constitutionally permissible to hedge about trial and review of the more serious offenses with greater precautions and more elaborate aids for the defendant.

To classify which types of charges merit greater assistance for indigent defendants is a task for the legislative branch, which can investigate the matter fully and provide funds to implement its decision.

III.

Since there are many times as many misdemeanor and ordinance violation convictions as felony convictions, granting appellant's demand and extending the *Griffin* rule to indigent appeals of every conceivable offense, no matter how petty, would multiply its applicability many, many times. It would stimulate the filing of many more appeals, a sizable proportion of them no doubt frivolous. It would result in further congestion of the dockets of our already overloaded courts of review. It would be a sizable expense to the court systems of the states. Defending such appeals would be a problem, both in terms of money and manpower,

to the counties and municipalities, many of which are already in financial straits.

Consistency appears to require that, if *Griffin* is applicable to all indigent misdemeanor and ordinance violation defendants, then *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), would also be applicable to every offense, no matter how petty, and counsel would have to be supplied at public expense to indigents defending such charges, both on appeal and in all proceedings at the trial level.

Therefore, it is timely and appropriate for this Court to re-examine *Griffin* now. For *Griffin* was a 5 to 4 decision and, in the opinion of the four dissenting justices, the reasoning of the majority opinion was not compelling.

All the justices in *Griffin* agreed that a policy of supplying transcripts at public expense to indigents appealing felony convictions is desirable. But the four dissenting justices thought this should not be by constitutional compulsion, but is properly a state legislative judgment. The dissenters pointed out that 29 states already (in 1956) made such provision.

The majority held, however, that the Fourteenth Amendment required the states to afford destitute defendants "as adequate appellate review as defendants who have money enough to buy transcripts."

The dissenting opinions maintained that the equal protection and due process clauses of the Fourteenth Amendment do not impose upon the states a duty to lift the handicaps flowing from differences in economic circumstances that exist wholly apart from any state action. Indeed, it is impossible to equalize appellants as long as some defendants can afford better lawyers, better investigations and release on bail.

This Court has on numerous occasions seen fit to re-examine and disavow its prior decisions. The demand of

the instant appellant that *Griffin* be extended to every indigent appeal of every conceivable petty offense, with disastrous consequences to the court systems of the nation, presents this Court with a fitting occasion to re-examine the rationale of *Griffin*.

IV.

It is not improper for this Court to consider the practical impact upon the state court systems of granting appellant what he demands.

Supplying free transcripts at public expense to every indigent appealing a misdemeanor or ordinance violation conviction, no matter how petty, would logically require extension to every indigent defendant, no matter how petty the charge, of the right to free counsel at public expense, both on appeal and during all phases of proceedings at the trial level.

Experience has demonstrated that following the granting of free counsel and free transcripts to indigent appellants of felony convictions, the number of criminal appeals increased vastly. This has been an important factor contributing to the current crisis in the administration of criminal justice.

Mandatory review, especially of petty cases, is not essential to due process. Review of such cases could properly be made largely discretionary.

The practical dimensions of the problems that would be raised in the event appellant prevails are vastly underestimated in his brief.

Appellant's assertion that the great majority of nonfelony charges are disposed of without trial is misleading. The number of nonfelony cases is so vast that the fraction that goes to trial constitutes a legion of hundreds of thousands, indeed, millions.

In Chicago, there are at present 20 courtrooms devoted to the trial of nontraffic, nonfelony cases, and 20 more courtrooms to the trial of traffic cases. There are 11 more courtrooms of the Circuit Court of Cook County trying nonfelony cases in the suburbs of Chicago.

In the 1969-1970 court year, 354,315 hang-on traffic complaint cases were tried, an average of 71 hang-on complaint traffic cases tried in each of 20 traffic courtrooms each day. In the same year, the traffic court of Chicago tried 928,556 personal service complaint traffic cases, in which 496,293 resulted in findings of guilty.

248,207 nontraffic, nonfelony cases were processed in Chicago during the same court year, an average of 50 cases per day in each of 20 courtrooms.

It is estimated by an exhaustive American Bar Foundation study that about 5,000,000 persons are charged with non-traffic misdemeanors in the United States each year, and that of these, at least 25%, or 1,250,000, are indigent.

In Chicago there are about four times as many nontraffic ordinance violation cases as misdemeanor cases. Projecting Cook County proportions nationally results in the rough estimate of 20,000,000 non-traffic ordinance violation cases each year.

It is authoritatively estimated that 25 per cent or 1,250,000 of the misdemeanor defendants are indigent. At the modest average cost of $50 per case for services of attorneys and, where needed, investigations and expert witnesses, this case load would aggregate a total cost of $62,500,000 to defend. How many of the possibly 20,000,000 ordinance violation defendants are indigent is unknown.

Standards for determining indigency vary widely from state to state, from county to county within the same state, and within the same court. The judicial determination of indigency is often casual and merely approximate.

The sheer number of indigents who become involved in the criminal process necessarily plays a large part in determining whether ideals with respect to defense can be realized.

Although most nonfelony trials are brief, a substantial proportion are not. Even though only a small percentage of the estimated 1,250,000 nonfelony trials of indigents in the United States are of considerable length, that small proportion constitutes a sizable number.

Some nonfelony trials are very extensive. Transcripts in ordinance violation cases sometimes run into hundreds, even thousands of pages.

V.

The rule of *Griffin* v. *Illinois*, 351 U. S. 12 (1956), does not require the state to purchase a stenographer's transcript in every case where a defendant cannot buy it. Alternative methods of preparing a report of proceedings are permissible under *Griffin*. The rules of the Illinois Supreme Court provide for such less expensive alternatives. But the appellant has made no effort to use any of these alternatives. Thus, appellant has failed to prove his need for a complete free transcript.

VI.

The claim of indigency by this particular appellant is contradicted by the record and his own statement of facts. Contrary to his affidavit that he has an income of zero dollars, he is supported by his parents, whose circumstances are not disclosed. He does not state how much income he receives from his parents. His affidavit fails to mention his net worth. He is a student at New York University School of Medicine, yet he found the time during the school year to travel from New York to Chicago to

attend a demonstration. He journeyed to Chicago under the auspices of a medical aid group to assist, at least by a proffer of semi-skilled medical services, at a projected demonstration by S. D. S., a well known national protest organization, which is certainly able to raise money to pay for appellant's transcript. Most appellants, who are neither rich nor poor, have to pay for their transcripts with hard earned money. To provide an appellant with Mayer's resources with a 400-page transcript at public expense is ludicrous.

ARGUMENT.

I.

THE ORDER APPEALED FROM IS NOT IN CONFLICT WITH WILLIAMS v. OKLAHOMA CITY.

Appellant's contention (Appellant's Brief, pp. 19, 20) that the decision of this Court in *Williams* v. *City of Oklahoma City,* 395 U. S. 458 (1969), "controls this case" will not withstand careful examination. Although a cursory glance at this Court's language in the *Oklahoma City* case might create an impression of support, this Court was in fact there confronted with a distinctly different situation.

Under applicable Oklahoma law, there existed, as a condition precedent to the filing of an appeal to the Oklahoma Court of Criminal Appeals, the requirement that the appellant file either a transcript or a "case made". Okla. Stat. Ann., Title 22, § 1059 (1958), § 1060 (Supp. 1968). It appears that under Oklahoma practice, a transcript consists of proceedings of record in the trial court other than the evidence introduced, while a "case made" is a record, approved by the trial court, of so much of the proceedings, including the evidence, as is necessary to present the issues for review.

An Oklahoma "case made", it should be noted, is not necessarily a verbatim report of the testimony heard at the trial. As *Dobbs* v. *State,* 114 P. 358, 360 (Okla.; 1911), states:

> "While the stenographer's notes of the testimony constitute the most convenient means of preparing a case-made, yet they are not the only source from which a case-made may be prepared. Even when a case-

> made is prepared from the stenographer's notes of the testimony, it must still be approved by the judge who tried the case, and he is not bound by such notes, but must still see that the case-made speaks the truth, and he may correct such case-made from memory or from any source that may be satisfactory to him."

The Oklahoma statute made it mandatory that a criminal appellant file either a "case-made" or a transcript, as that term is understood in Oklahoma. Without one or the other, there could be no criminal appeal.

In *Williams* v. *City of Oklahoma City* (at 485, 459), the trial proceedings had in fact been stenographically transcribed pursuant to Oklahoma law. Okla. Stat. Ann., Title 11, § 798 (1959); Okla. Stat. Ann., Title 20, §§ 110-111 (1962). But the trial court had refused, in the absence of express statutory authority, to order that a copy be provided Williams. The trial court did this despite its own specific findings that Williams was indigent, that the grounds of his appeal were not without merit, and that neither Williams nor his appointed counsel could make up a transcript of the trial proceedings from memory. This ruling of the trial judge thus cut off Williams' possibility of appealing, despite an express state statutory provision that an appeal from any criminal judgment might be taken as a matter of right. In that situation, this Court held (at 460) that the decision of the Oklahoma Court of Criminal Appeals "wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation of a 'case-made'." This Court ruled this was forbidden by the Fourteenth Amendment.

In Illinois there is no requirement that a report of proceedings be filed in order to perfect an appeal. Mayer has already docketed his appeal in the Illinois Supreme Court. The rules of that Court, as is explained below, set forth

alternative methods of presenting evidence on review. Appellant has not even attempted to utilize any of these alternative methods. Instead, he claims that the Fourteenth Amendment requires that he be furnished free a complete verbatim transcript of all the testimony at his trial and points to *Williams* v. *City of Oklahoma City* as the controlling authority.

The *Oklahoma City* case simply does not support the appellant's demand. Mayer's right to appeal has not been cut off. The Fourteenth Amendment requires only that he have as adequate a means of presenting the evidence necessary to decide the issue on appeal as nonindigents. The equal protection clause does not make it mandatory that an indigent's means of presenting the evidence be as convenient and as expensive as those of a person of unlimited means.

II.

ALL THE CONSTITUTIONAL AUTHORITIES CITED BY APPELLANT CONCERNED TRANSCRIPTS IN APPEALS FROM SENTENCES TO IMPRISONMENT. IN THE CASE AT BAR NO POSSIBILITY OF IMPRISONMENT IS INVOLVED. THIS IS A VALID BASIS FOR DISTINGUISHING APPELLANT FROM HIS AUTHORITIES.

All of the authorities relied on by appellant in his demand, under the Constitution, for a free transcript (Appellant's Brief, pp. 8, 9) were appeals involving sentences to the penitentiary, except *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), which had to do with a jail term.

In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the petitioners were convicted of armed robbery. In *Eskridge* v. *Washington*, 357 U. S. 214 (1958), the petitioner was convicted of murder and sentenced to life imprisonment. In *Burns* v. *Ohio*, 360 U. S. 252 (1959), the petitioner had been convicted of burglary and sentenced to life imprisonment.

Smith v. *Bennett,* 365 U. S. 708 (1961), was a habeas corpus proceeding brought by two indigent prisoners serving 10 year sentences in the penitentiary for burglary, and this Court (at 713) limited its holding therein to cases "involving indigent convicted prisoners." In *Douglas* v. *California,* 372 U. S. 353 (1963), the petitioners had been convicted of 13 felonies, including robbery, assault with a deadly weapon and assault with intent to commit murder, and had been given prison terms. The petitioners in *Draper* v. *Washington,* 372 U. S. 487 (1963), had been convicted of robbery and incarcerated in the penitentiary (at 491). *Lane* v. *Brown,* 372 U. S. 477 (1963), was a federal habeas corpus proceeding brought by a petitioner who had been convicted of murder and sentenced to death. In *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966), the petitioner had been convicted of larceny and sentenced to five years in the penitentiary. In *Roberts* v. *LaVallee,* 389 U. S. 40 (1967), the petitioner had been convicted of robbery, larceny and assault and sentenced to 15-20 years in prison.

Thus, all of the authorities cited in Appellant's Brief (pp. 8, 9) on the fundamental issue of this case involved indigents convicted of felonies and sentenced either to the penitentiary or to death, with the exception of *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969). In *Williams,* it is true, the defendant was convicted of drunken driving in violation of no more than a municipal ordinance, but for this he had been sentenced to 90 days in jail.

The instant appellant has been convicted of two municipal ordinance violations—disorderly conduct and interfering with a police officer in the discharge of his duties—and fined $250 for each offense. (A. 3, 4) Neither of the two ordinances (Sections 193-1a and 11-33, respectively, of the Municipal Code of Chicago, Illinois) provides for any imprisonment as a possible penalty. The maximum penalty under each ordinance is a fine of $500. (See Appellant's Brief, p. 1a.)

Under this Court's recent decision in *Tate* v. *Short,* 401 U. S. 395, 91 S. Ct. 668, 28 L. ed. 2d 130 (1971), which forbade imprisonment of an indigent to "work off" a fine he is unable to pay, solely because of his indigency, as that decision has been implemented by the Circuit Court of Cook County, Illinois, the chance of the instant appellant's being imprisoned for nonpayment of his fine is non-existent.

The whole practice of criminal law recognizes the difference between offenses punishable by imprisonment and those punishable only by imposition of a fine. Petty offenses are customarily punished only by fines. The most serious offenses are punished by mandatory prison sentences, if not by death.

Universal experience in the administration of criminal justice supports the reasonableness of this distinction and makes it the basis of valid classification, whereby trial and review for the more serious offenses are hedged about with greater precautions and more elaborate aids for the defendant.

The Supreme Court of Washington has noted in *Hendrix* v. *City of Seattle,* 76 Wash. 2d 142, 456 P. 2d 696, at 700 (1969), the continuing viability of this distinction. In discussing the analogous right to counsel in misdemeanor cases and in ordinance violation cases, it said:

> "Since the adoption of the sixth amendment, the Supreme Court of the United States has not, despite countless opportunities to do so, declared that one accused of a misdemeanor has a constitutional right to appointed counsel. See Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685 (1968). The traditional line drawn between felonies and lesser crimes has persisted from our colonial beginnings to the present time, and no authoritative decisions to the contrary have been presented to us which eradicate that distinction."

At least twice in recent years, this Court has denied certiorari in cases presenting the issue of an indigent's right to appointed counsel to defend against a misdemeanor charge. *Winters* v. *Beck,* 239 Ark. 1151, 397 S. W. 2d 364 (1966), *cert. denied,* 385 U. S. 907 (1966); *State* v. *DeJoseph,* 222 A. 2d (Conn.) 752 (1966), *cert. denied,* 385 U. S. 982 (1966).

Every civilized community of substantial size has the unfortunate, but inescapable need of establishing and maintaining special courts of limited jurisdiction designed to process lesser offenses expeditiously and economically. At the time of the adoption of the Constitution, this function was performed by justice of the peace courts. See *Marbury* v. *Madison,* 5 U. S. (1 Cranch) 137 (1803). Today their counterparts, the municipal police courts, perform the same function, which in fact constitutes the largest amount of judicial work in the nation.

Some misdemeanors are serious matters, but an untold number of ordinance violations, of a bewildering variety, are petty and many are of the utmost triviality. It may well be appropriate to supply indigents in serious misdemeanor cases with trial and appellate counsel and with appellate transcripts at public expense. But to classify types of charges meriting such aid for indigent defendants and to distinguish them from multitudinous petty offenses in which provision for such assistance is unnecessary and would be fatuous is beyond the proper scope and function of the judicial branch. It calls for legislative investigation, debate and judgment. The legislative branch is able not only to declare the duty, but to provide the funds to implement it.

It was in this manner that the Congress adopted the Criminal Justice Act of 1964, 18 U. S. C. § 3006 A, which directs the federal district courts to implement the "furnishing representation for defendants charged with felonies

or misdemeanors, *other than petty offenses* as defined in section 1 of this title." (Emphasis supplied.) Petty offenses are there defined as offenses punishable by less than 6 months imprisonment. In nonpetty offenses the statute provides indigent defendants not only with counsel, but also with transcripts, investigative services and expert witnesses if, in the court's judgment, such services are necessary to an adequate defense.

For these reasons the attempt of the instant appellant to stretch the rule of *Griffin* v. *Illinois* to encompass a case of ordinance violations, not punishable by imprisonment, should be denied.

III.

THE RATIONALE OF THIS COURT'S OPINION IN GRIFFIN v. ILLINOIS NEEDS RE-EXAMINATION.

In the vivid language of Appellant's Brief (p. 8), fifteen years ago, in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), this Court "fleshed out" the Fourteenth Amendment by holding (at 20) that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Invoking the majority opinion in *Griffin* as a sacred axiom, the appellant invites the Court to add considerable excess avoirdupois on the Fourteenth Amendment by extending the *Griffin* principle to every conceivable petty offense.

Since this would involve multiplying the applicability of *Griffin* manyfold, with foreseeable potent effects on the appellate court systems of the country, and result in further congestion of the overloaded and slow moving dockets of our courts of review, and since all the authority there may be for this demand stems from *Griffin*, it would seem to be not amiss for this Court to re-examine the reasoning of its opinion in *Griffin*.

For *Griffin* was a 5 to 4 decision. Although the four dissenting justices all expressed (at 26, 27, 29) agreement with the desirability of the policy—as a matter of legislative decision—of supplying an indigent defendant with a free transcript "*in a case like this*" (emphasis supplied)—that is, an appeal from a felony conviction resulting in a penitentiary sentence—, they were not impressed with the reasoning whereby there became attached to this policy a federal constitutional compulsion binding on the states.

A common-sense note was sounded in the dissenting opinion written by Justice Burton and joined in by three other justices. His observation (at 28, 29) is still true:

> "Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot."

How, indeed, could criminal appellants be equalized in the sense of the majority opinion in *Griffin* v. *Illinois* unless all were required to be assigned their attorneys and investigators by random selection from a pool, unless the attorneys were all compensated at the same rate, and the investigators likewise, and unless bail was abolished and all accused either released on their own recognizance or all kept in jail?

To the wisdom of Justice Burton's statement the separate dissenting opinion of Mr. Justice Harlan (at 34) added the ungainsayable observation:

> "All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.
>
> "The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all per-

> sons equally means in this instance that Illinois must give to some what it requires others to pay for. . . . It may as accurately be said that the real issue in this case is not whether Illinois has discriminated but whether it has a duty to discriminate."

It is true that, on the authority of *Griffin,* appellant invokes due process as well as equal protection. (Appellant's Brief, pp. 26, 27). But, as appellant expresses it, due process in this context means it is unfair for appellant to be deprived of equal protection. And, in our view, the same comment is applicable to the treatment of the due process aspect of the *Griffin* case embodied in Justice Frankfurter's concurring opinion (at 20-26). The dissenting opinion of Mr. Justice Harlan (at 36-39) made that appraisal of the due process contention.

At the time of the adoption of the Fourteenth Amendment, it was of course not intended to rectify differences in economic circumstances existing wholly apart from any state action. Nor, even at the present time, do the vast majority of Americans, whether educated in the law or not, believe that the Fourteenth Amendment should be so interpreted.

The concern of the justices joining in the majority opinion in *Griffin* that indigents appealing felony convictions have the advantage of a report of proceedings adequate for the purpose was recognized as praiseworthy and was indeed shared by the four dissenting justices. At the time of the *Griffin* decision in 1956, 29 states, as Mr. Justice Harlan noted (at 38), already provided free transcripts to indigent appellants in felony cases, both capital and noncapital—as a matter of public generosity, by legislative fiat of the people's representatives.

When transcripts are allowed indigents, not by sweeping constitutional declarations, but by legislative grant, then priorities can be ordered and the extent of the grant can

be controlled by the public will. An expenditure of public funds, no matter how worthy the purpose, necessarily results in either curtailment of other public services or increased taxation. The decision as to how state moneys are to be disbursed properly belongs in the states.

Whether what the instant appellant seeks should be allowed, whether indigent appellants of misdemeanor and ordinance violation convictions, even in petty cases involving no possibility of imprisonment, should be given free transcripts, with the vast repercussions this would entail for the entire state appellate and even trial court systems of the nation—that is a decision for each state to make in the light of its own resources, needs and priorities. It appears unwise to mandate by constitutional decree transcripts in indigent appeals of any and every conviction, no matter how minor the offense.

This Court is the most self-critical of courts. More than ninety times in its history has this Court seen fit to re-examine its prior decision. Blaustein and Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, at 162 (1958); Douglas, *Stare Decisis*, 49 Col. L. Rev. 735 (1949). Therefore, we respectfully suggest to the Court that the time has arrived to re-examine the reasoning of the majority opinion in *Griffin v. Illinois*, 351 U. S. 12 (1956). This is made imperative by the demand of the instant appellant that the rule of *Griffin* be canonized as a sacred axiom and mechanically extended to indigent appeals of convictions of every petty offense.

IV.

IF THE RULE CONTENDED FOR BY APPELLANT PREVAILS, IT WILL INEVITABLY RESULT IN A LARGE INCREASE IN THE NUMBER OF APPEALS, WITH ADVERSE EFFECTS ON THE COURT SYSTEMS.

It is not improper for this Court to consider the mundane consequences of its decisions. The appellee has no desire to conjure up a parade of nonexistent horribles. But certainly the appellant begs the question in stating (Appellant's Brief, p. 28) that "[i]t may be anticipated that the City will argue that defendant, and like-situated indigents, should be denied his Fourteenth Amendment right to a free transcript on appeal because to grant him his right might somehow irreparably burden the State fiscal system." The question is, Does defendant have such a right? And relevant to a determination of that problem is the welfare of society and of its governments and court systems.

In the work of deciding cases, the directive force of a principle may be exerted along the line of logical progression, along the line of historical development, along the line of the customs of the community or along the lines of justice, morals and social welfare. Cardozo, *The Nature of the Judicial Process* (1968 ed.), pp. 9, 30, 31. Although the great generalities of the Constitution have a content and significance that vary from age to age (Cardozo, *op. cit.*, p. 17), the development of constitutional principles is not necessarily in the direction of endless expansion.

The adverse effects of granting appellant what he seeks would include more than the cost of providing free transcripts to indigents appealing misdemeanor and ordinance violation convictions. If *Griffin* v. *Illinois*, 351 U. S. 12 (1956), is extended to every indigent appealing a misdemeanor or ordinance violation conviction, then it is conceivable that *Gideon* v. *Wainwright*, 372 U. S. 335 (1963),

might be construed to require that such defendants be furnished with free counsel, both on appeal and during all phases of proceedings at the trial level. As Justice Walter V. Schaefer of the Illinois Supreme Court observed more than a few years ago:

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

It is not alarmism, but sober realism to anticipate that, if appellant's contention is upheld, a proliferation of appeals will result. The ruling appellant desires would constitute an open invitation to frivolous appeals and to unrestrained loquacity in trials. This would necessarily result in a great drain on the time of courts of review, acute personnel problems in appellate courts, and interference with and delay of other appeals, both of felonies and civil matters.

The extent to which appellate practice will probably be stimulated if appellant prevails can be gauged by the effect thereon of the enactment in 1964 of Section 121-13 of the Illinois Code of Criminal Procedure (Ill. Rev. Stat., 1965, ch. 38, § 121-13; now superseded by Illinois Supreme Court Rule 607, to the same effect). This requires the courts to appoint counsel and provide a trial transcript to indigent persons appealing felony convictions. Oaks and Lehman in their *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), pp. 147, 148, report that during the four year period preceding January 1, 1964, the Public Defender of Cook County had averaged only six appeals per year, but that in the two years immediately following, he had been appointed at the rate of about 150 appeals per year.

The effect of this flood of felony appeals on the appellate

court system of Illinois is only too clear. According to the *1968 Annual Report of the Administrative Office of the Illinois Courts* (p. 23), the First District of the Illinois Appellate Court, which hears only appeals from Cook County, had pending before it on January 1, 1968, 657 civil appeals and 465 criminal appeals. 520 new civil appeals and 383 new criminal appeals were filed during 1968. The court disposed of 483 civil appeals and 319 criminal appeals during 1968. At the end of the year the court had pending on its docket 696 civil cases and 535 criminal cases. This constituted an increase in the court's backlog during 1968 of 19 civil cases and 70 criminal cases.

As for time elapsed between the date of filing in the Appellate Court and the date of disposition, of the cases decided in 1968, the same report (p. 25) indicates that 61 civil cases and 34 criminal cases required less than six months, 101 civil cases and 69 criminal cases took between six months and a year, 156 civil cases and 82 criminal cases lasted between a year and a year and a half, 108 civil cases and 94 criminal cases took between a year and a half and two years, 75 civil cases and 77 criminal cases continued between two and three years, and 19 civil cases and 27 criminal cases remained before the Appellate Court for more than three years. There is no indication that this trend has been reversed or even abated.

Experience in the State of Washington has been similar. *Hendrix* v. *City of Seattle*, 76 Wash. 2d 142, 456 P. 2d 696, at 710 (1969), reports:

> "Since 1962, an enormous increase in appeals to the Supreme Court has taken place, a steadily increasing percentage of which is brought at public expense. Should this trend continue at the present rate under existing procedures, nearly all of this court's time and energy will be pre-empted by criminal cases to the exclusion of practically all others.

A footnote on the same page of the *Hendrix* opinion states:

> "The records of the Clerk of the Supreme Court show the following number of criminal appeals filed in the Supreme Court and the percentage of indigent appeals for the following years:

Year	Total Criminal Appeals	Indigent Appeals	Percentage* Increase-Decrease
1962	75	32	%42
1963	75	35	46
1964	101	49	48
1965	136	64	47
1966	164	79	48
1967	222	131	59
1968**	90	56	62

> * Percentage indigent of total appeals.
>
> ** For 6 months, January 1 through June 30, 1968."

This state of affairs has been described by Chief Justice Burger (57 A. B. A. J. 425 (1971)) as an important part of the breakdown of the American system of criminal justice:

> ". . . [T]he convicted persons are not punished promptly after conviction, because of delay in the appellate process.
>
> ". . . I have said nothing of civil justice—the resolution of cases between citizens or between citizens and government. This, unhappily, is becoming the stepchild of the law, as criminal justice once was. Most people with civil claims, including those in the middle economic echelons, who cannot afford the heavy costs of litigation and who cannot qualify for public or government-subsidized legal assistance, are forced to stand by in frustration and often in want, while they watch the passage of time eat up the value of their case."

This swelling of the criminal appellate practice has an adverse effect on the functioning of the entire court system.

With the development of highly integrated court systems under the close control of appellate courts, the extent of appellate review has been greatly expanded and increased in frequency. The appellate courts have developed into courts of comprehensive review for the authoritative determination of the law and, in many instances, of the facts as well. The process requires the declaration of the law with the utmost meticulousness so that trial courts can make it effective in ruling on motions and in instructing juries. The entire judicial system has become appellate minded. Frequently the trial judge is not much more than a trial examiner. This has produced a tremendous mass of judicial decison which in itself constitutes a formidable problem for both the judiciary and the bar. Green, *Jury Trial and Mr. Justice Black,* 65 Yale L. J. 482 *et seq.* (1965).

This has not resulted in an acceleration of the disposition of cases. Rather, the dockets in both trial and appellate courts in the increasing number of heavily populated areas are steadily becoming more crowded. More judges, both trial and appellate, are required. Then, more courts, both trial and appellate. Then, more trial procedures and more appellate procedures. Then more authoritative declarations by the appellate courts on points of procedural and substantive law, etc., etc. (*id.*)

This is all part and parcel of what competent observers consider the current overemphasis on appeals. Trial by record has marked disadvantages and grant of a full appeal does not necessarily achieve a more just result. As Leon Green wrote in *Jury Trial and Mr. Justice Black,* 65 Yale L. J. 482, at 487 (1957):

> "It is only with the utmost effort, if at all, that even the most able and patient appellate judge can bring a case back to life. And not only has the case lost its vitality, it has taken on new elements which may affect its disposition; new personalities; inadequate briefs, per-

haps; restatement and reinterpretation of the facts and the law; the wider administrative outlook from the appellate bench; and a multitude of what are thought of as purely incidental influences—subtle influences—which nevertheless take their toll. Passing on the merits of a close case at long range in time and distance and in a hushed environment is a delicate undertaking."

In this connection it is relevant that, as Justice Frankfurter observed in his concurring opinion in *Griffin* v. *Illinois,* 351 U. S. 12, at 21 (1956), criminal appeals are a relatively recent innovation. In England there was no appeal from a conviction until 1907. No criminal appeals were afforded in the federal courts for nearly a hundred years. Illinois, on the other hand, in the forefront of the States, established criminal appeal in 1827, as Mr. Justice Harlan noted in his dissent in *Griffin* (at 36). Ill. Rev. Stat. 1827, Crim. Code §§ 186, 187.

If the rule contended for by appellant prevails, it may result in forcing the states, in self-defense, to make their appellate jurisdiction largely discretionary.

Be that as it may, it seems unlikely that, with all the attendant problems of and burdens on the appellate process, 400 pages of typewritten record will necessarily assure a more adequate result than the two days of live jury trial that appellant has already had.

a. Appellants' Portrayal of the Practicalities of the Problem Is Highly Inaccurate. It Woefully Underestimates the Number of Nonfelony Trials and the Length and Complexity of a Sizable Proportion of Them.

(1) Appellant cites (Appellant's Brief, p. 29) the 1971 budgets of the Chicago Bureau of Sanitation ($45 million), the Chicago Fire Department ($72 million) and the Chicago Police Department ($210 million) in an effort to make it

appear that the cost of supplying free transcripts to indigents—$223,474 in all indigent felony appeals in Illinois in 1970—is inconsequential. Nothing is proven by such a forced, artificial comparison. The sanitation, police and fire fighting needs of Chicago are far more pervasive than the litigation expenses of indigent convicted felons appealing their convictions, and at least as important.

Although it is not of record, it seems worthwhile to mention that we have been informed by the Director of the Administrative Office of the Illinois Courts, Mr. Roy O. Gulley, that $325,000 is now being appropriated annually for payment to court reporters in preparing transcripts for indigent defendants in felony appeals. He also anticipates, that if free transcripts are granted indigents appealing misdemeanors, an additional 100 to 150 court reporters will be required in the state, at an additional cost of approximately $1,725,000 per year. Mr. Gulley further states that there is now a shortage of court reporters in Illinois and it might be impossible to obtain the services of an additional 100 court reporters for several years.

(2) That the library fees collected from civil litigants by the Circuit Court of Cook County, Illinois, in order to maintain a large, modern public metropolitan law library for the use of bench and bar, is only about twice the amount of the cost of supplying indigent Illinois felony appellants, as the Appellant's Brief states (p. 29), illustrates the magnitude of the cost of subsidizing such appeals.

(3) Another specious point made in Appellant's Brief (pp. 37, 38) is that it ill behooves the City of Chicago to argue against furnishing free transcripts to indigents when the judicial system there, the Circuit Court of Cook County, according to the *Statistical Report: Cases, Fees and Cost, 1967-1970,* prepared by Matthew Danaher, Clerk of the Circuit Court of Cook County, Illinois (hereinafter referred to as the Danaher Report), (p. 1), had in 1970 a total

revenue of over $31 million. The Danaher Report states that this amount was not only collected, but distributed—that is, paid over to Cook County and the City of Chicago for general county and municipal purposes. The same report (p. 1) also notes that the Criminal Division in 1970 had receipts of only $84,053. Certainly the expense of operating the Criminal Division was many times that amount. Whether the Circuit Court of Cook County is operated at a "profit" does not appear from the Danaher Report. Appellant's Brief (p. 38) states that in the Court of General Sessions of the District of Columbia, the expense of conducting that court during an unspecified period of time ran to only $2.2 million, while $4.7 million was collected by it in revenue. Appellant's Brief also states (p. 38) that the municipal court of Oklahoma City collected $1,553,205 in fines and costs, while expenses incurred by that court were only $217,675. That all this is irrelevant is proven by the appellant's observation (Appellant's Brief, p. 38) that the courts are possibly "the only public service which is financially self-sustaining." The courts' excess of income over expenses, where it occurs, is applied to maintain other public services, for which it is badly needed.

(4) Appellant's assertion (Appellant's Brief, p. 30) that the great majority of nonfelony charges is disposed of without trial, by forfeiture, plea or dismissal, is misleading. The number of nonfelony cases is so vast that the fraction that goes to trial constitutes a legion of hundreds of thousands, even millions.

For example, in Chicago there are at the present time 20 courtrooms devoted to the trial of nontraffic, nonfelony cases and 20 more courtrooms devoted to the trial of traffic cases. There are 11 more courtrooms in the Cook County suburbs. Thus, there are at present 51 branches of the Circuit Court of Cook County, Illinois, trying misdemeanor, ordinance violation and traffic cases.

Contrary to appellant's suggestion (Appellant's Brief, p. 32) that "the vast bulk of non-felony convictions" are traffic cases and that few traffic defendants, being owners of automobiles or employed drivers, could qualify as indigents, it should be remembered that the indigent appellant in the case on which appellant principally relies, *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), was appealing from a traffic conviction of drunken driving and that he was allowed to proceed as an indigent, although he owned an automobile.

According to the *Daily Municipal Court Record* (Chicago) of June 21, 1971, pp. 1, 3, in the First District (Chicago) of the Municipal Division of the Circuit Court of Cook County, there are 20 courtrooms in operation, trying traffic cases. Two of these are jury courtrooms. Trial calls are set for 9 a.m., 10:30 a.m., 1 p.m. and 2:30 p.m., in each courtroom, daily five days a week.

In the First District, the five following courtrooms of the Municipal Division (which is not empowered to try felonies) are located in the Criminal Court Building: mass arrest court, violence court, two narcotics courts, jury court. In the Central Police Headquarters in Chicago, there are four courtrooms devoted to the trial of non-felony cases: youth court, domestic relations court, women's court and central police court. There are also 11 outlying courtrooms at 8 different locations in Chicago. There are three youth courts, two auto theft courts, a paternity and nonsupport court, two misdemeanor courts and three branch police courts, one each on the north, south and west sides.

The 11 suburban courtrooms in Cook County are three courtrooms in the Second District (Evanston-Winnetka-Skokie), two courtrooms in the Third District (Niles-Harwood Heights), one courtroom in the Fourth District (Forest Park), two courtrooms in the Fifth District (Oak

Lawn-Worth) and two courtrooms in the Sixth District (Harvey-Blue Island).

It is impossible to conceive why all these courtrooms are required if, as appellant suggests (Appellant's Brief, p. 31), the "vast bulk" of the over one million nonfelony determinations in Chicago each year were merely forfeitures and mail-in fines.

The fact that even hang-on complaints (parking tickets) frequently result in trial is demonstrated by the Danaher Report (p. 12). This report reveals that in the 1969-70 court year, there were in the Municipal Department, First District, 2,833,325 "hang-on complaints". Of these, 1,287,207 pleaded guilty before court date, i.e., mailed in their fines. 1,317,363 failed to appear and summons issued. 329,939 were disposed of, on hearing, as not guilty. 24,376 were found guilty after trial.

Thus, 354,315 hang-on complaint traffic cases were actually tried in Chicago during the last court year. Distributed among 20 traffic courtrooms in Chicago, this would make an annual average of 17,716 such cases per courtroom. In a year of approximately 250 working court days, this constitutes an average of 71 hang-on complaint traffic cases tried and determined in each courtroom each day.

During the same year, the Chicago traffic courts processed 911,130 new personal service complaint cases. 369,315 of these defendants pleaded guilty and mailed in their fines before court date. 928,556 complaints (new and old) came up for court hearing. 496,293 were found guilty. 370,600 were disposed of as not guilty.

As for nontraffic ordinance violation complaints, the Danaher Report (p. 10) indicates that the First District (Chicago) of the Municipal Division of the Circuit Court of Cook County received during the last court year 42,857

criminal complaints (of which 2,863 were transferred to the Criminal Division), 222,855 quasi-criminal complaints and 19,999 complaints described as "preliminary". Leave to file the complaint was denied in 90,444 of these cases; 24,617 were stricken on leave to reinstate; 31,231 were nolle prossed, and 31,652 were dismissed for want of prosecution. 31,414 were discharged. 38,849 were found guilty. Of these 6,484 were placed on probation; 19,146 were fined; 10,933 were given terms in the House of Correction; 1,188 were sentenced to the County Jail; and 348 were sent to State institutions. Thus, during the 1969-70 court year, the 20 nontraffic, nonfelony courtrooms of the First Municipal District (Chicago) handled 248,207 cases. That comes to an annual average of 12,410 cases per courtroom. In a year of approximately 250 working court days, this constitutes an average of about 50 cases per day in each of the 20 courtrooms.

(5) How many misdemeanor and ordinance violation cases are tried in the United States each year?

The monumental American Bar Foundation study, Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (1965), Vol. 1, pp. 123-125, concludes that it is difficult to estimate the number of persons charged with misdemeanors in the United States each year. Only a few states publish reports on misdemeanors, and even these are lacking in uniformity because of differences in definitions and methods of reporting. Without counting motor vehicle offenses, the number of misdemeanors is very much larger than the number of felonies. The ratio ranges from about 4 times the number of felonies in Iowa to about 30 times the number in New Hampshire. On the basis of a projection from the 12 states then reporting misdemeanors, Silverstein estimated that, without counting defendants in motor vehicle cases, there were about 4,470,000 misdemeanor defendants in the United States

in 1962. Silverstein further estimated that in 1965, about 5,000,000 persons a year are charged with nontraffic misdemeanors in the state courts.

Silverstein's figures do not include municipal ordinance violation cases. However, in Cook County, Illinois, where the official figures until 1964 reported misdemeanors and ordinance violations separately, there were, in 1963, 44,463 misdemeanor cases and 163,472 ordinance violation cases. Oaks and Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), p. 39. Thus, there were almost four times as many ordinance violation cases as misdemeanor cases in Cook County in 1963. In 1964, when misdemeanors and ordinance violations were reported together, there were 205,397 nontraffic misdemeanor and ordinance violation cases reported terminated, while during the same period 4,225 felony cases and 1,643,381 traffic cases were terminated. (*id.*, p. 36)

By projecting the Cook County figures—four times as many nontraffic ordinance violations as misdemeanors—upon Silverstein's estimate of 5,000,000 misdemeanors in the nation annually, we reach a rough approximation of 20,000,000 ordinance violation cases in the nation each year.

(6) What proportion of misdemeanor and ordinance violation defendants are indigent? Silverstein states (*op. cit.*, Vol. I, pp. 124, 125) that such figures are almost totally lacking.

Approximately 55% of accused felons in the Circuit Court of Cook County, Illinois, are sufficiently poor to qualify for representation by the public defender or court-appointed counsel. Oaks and Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), pp. 84, 85.

Silverstein (*op. cit.*, Vol. I, pp. 124-125) believes that a considerably larger proportion of felony than of mis-

demeanor defendants are indigent. He states that it is impossible to estimate with accuracy what percentage of misdemeanor defendants are indigent, but is of the opinion that many defendants who cannot afford to retain an attorney in a felony case can do so when charged with a misdemeanor. Silverstein concludes with the conservative estimate that no more than 25% of misdemeanor defendants are indigent. If this figure is accurate, then there are about 1,250,000 indigent misdemeanor defendants in the United States each year.

If each of these 1,250,000 misdemeanor charges against indigents were defended by a public defender or court-assigned counsel at the very modest average cost of $50 per case to cover services of attorneys, investigators, expert witnesses, etc., the total cost would be $62,500,000 for all state courts.

How many of the 20,000,000 nontraffic ordinance violation defendants per year are indigent is anyone's guess.

(7) The answer to the threshold question, "What is an indigent?," is anything but clear. Statistical surveys and decisional law indicate that standards of indigency vary not only from state to state, but from county to county within a state, and within the same court. Stifler, *Determining the Financial Status of an Accused,* 54 Ill. Bar J. 868, at 880 (1966); Silverstein, *Defense of the Poor* (1965), Vol. 1, pp. 105-119.

The problem of evaluating the situation of an accused with limited means should be relevant to the occasion, to his defense needs in his particular case. Some of the factors which should be considered have been outlined by Judge Prettyman:

> "Under what financial circumstances is a person accused of crime entitled to legal service at no cost to himself? Of course a person with nothing in any way, shape or form is indigent. But suppose that, although

he has no ready cash, he has assets such as a car, a television set or a refrigerator. Suppose he has no readily convertible asset but has an equity in a home. Suppose he has in his pocket a hundred dollars but owns not another sou. Suppose he earns plenty but spends more and so is always in debt. Suppose he has nothing himself but has a wealthy father, a thrifty brother or a kindly employer or friend. Suppose he can make a satisfactory installment arrangement. Suppose he cannot pay a fee commensurate with the service needed but could pay a small proportion of it. Suppose his wife works and really supports the family and is willing, if need be, to shoulder the burden of his defense, even though for what reason no objective observer can discern." Prettyman, *Three Modern Problems in Criminal Law,* 18 Wash. & Lee L. Rev. 187, at 212 (1961).

See also Connally, *Problems in the Determination of Indigency for the Assignment of Counsel,* 1 Ga. S. B. J. 11, at 12, 13 (1964).

Those courts which are exacting in determining indigency will, according to Stifler, *Determining the Financial Status of an Accused,* 54 Ill. Bar J. 868, at 870, 871 (1966), consider most, if not all, of the following factors: (1) real property the accused might own; (2) personal property; (3) employment; (4) pensions, social security, and unemployment compensation; (5) number of dependents; (6) outstanding debts; (7) seriousness of the charge; (8) whether the accused has been able to make bail; and (9) financial resources of relatives.

But the determination of indigency is very often a casual proceeding. As described by Dowling and Yantis, *Defense of the Poor in Criminal Cases in Illinois,* 47 Chi. B. Rec. 216, 219 (1966), in Cook County, Illinois, it usually consists of two questions in open court asked by the judge: "Do you have a lawyer?" And, if not, "Do you have funds with which to hire a lawyer?" The prevailing

attitude of Illinois judges toward the determination of indigency is reflected in the usual practice. If the defendant has not made bail by the time of arraignment, and if he says he is unable to hire a lawyer and wants one, then the court assumes that the defendant is indigent and appoints counsel for him. It is assumed that if the defendant were financially able, he would most probably have secured his release on bail and have retained his own attorney.

Oaks and Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), p. 82, summarizes the situation thus:

> "It is, however, far from clear when counsel or other assistance must be supplied, what the requirement of counsel includes, or, for that matter, what indigence means. These are policy questions that must be answered at least in part in terms of social realities and social purposes such as the sheer number of indigents who become involved with the criminal process.
>
> "The number of persons who become involved with the criminal process will play a large part in determining whether our ideals with respect to adequate defense can be realized. Any increase in the scope of protection will place pressure upon society generally in terms of costs and on the bar in particular in terms of manpower. The stiffer these pressures are, the more likely they are to be resisted."

(8) One more misconception of appellant to be corrected is the argument (Appellant's Brief, p. 30) that "since most nonfelony trials are very short in duration, those transcripts that are required on appeal are not lengthy."

Although the great majority of nonfelony trials are brief, a substantial proportion are not. Even if only a small proportion of the conservatively estimated 1,250,000 nonfelony trials of indigents throughout the United States each year are of considerable length, that small proportion constitutes a very sizable number.

That nonfelony trials can be extensive is illustrated by the instant appeal. Here a simple incident during a demonstration that broke down into violence, an incident lasting but a moment, resulted in a two-day jury trial, the 400-page record of which will cost some $300 to transcribe (Appellant's Brief, pp. 4, 7).

Earlier this year this Court denied certiorari (..... U. S. .....) in the case of *City of Chicago* v. *Staughton Lynd, et al.*, 47 Ill. 2d 205 (1971). Like the instant matter, the *Lynd* case involved merely a charge of interfering with a police officer in the performance of his duties, a municipal ordinance violation. Yet the transcript of testimony ran to 643 pages. At the present time, the City of Chicago is the appellee in a municipal ordinance violation case pending in the Illinois Supreme Court entitled *City of Chicago* v. *Peter Weiss, et al.*, No. 42487. The trial of this disorderly conduct case, though without a jury, lasted 6 weeks and precipitated a transcript 6,029 pages in length.

b. Indigents' Rights to Free Transcripts in Appeals of Petty Offenses in California, New York and in Other Places Are Much Less Extensive Than in Appellant's Account Thereof.

Appellant's argument (Appellant's Brief, pp. 36, 37) from his claim that several states "already grant free transcripts to all indigent defendants regardless of the nature of the offense of which they are convicted" requires comment in some detail.

(1) The appellee agrees that to furnish to genuine indigents some form of a report of proceedings sufficient to present adequately their points on appeal from convictions for felonies and serious misdemeanors involving imprisonment is a desirable policy if the legislature sees fit to authorize it.

(2) The appellee denies that, if some states do furnish free transcripts to indigents appealing lesser convictions, this creates a constitutional obligation on all the other states to do the same.

(3) Appellant has made no attempt to prove that this alleged practice in some other states has not in fact created an undue public expense and that it has not burdened the courts of review in those states.

(4) The situation with respect to lesser offenses is quite different in California and New York, the two principal states cited by appellant in this connection, from that in Illinois.

In California, municipal ordinance violations are deemed criminal in nature and are prosecuted in the name of the People. *People* v. *Pacific Gas and Electric Co.*, 168 Cal. 496, 143 P. 727, 728 (1914); *In re Clark*, 24 Cal. App. 389, 141 P. 831, 832 (1914); 35 *Cal. Jur.* 2d, Municipal Corporations, § 420. New York also considers a municipal ordinance violation a misdemeanor. 52 McKinney's Consol. Laws of N. Y. Anno., Second Class Cities Law, § 42; 40 *N. Y. Jur.*, Municipal Corporations, § 749.

In Illinois, municipal ordinance violations are distinguished from misdemeanors, which are violations of state statute, but not punishable by imprisonment in the penitentiary. Municipal ordinance violations are in Illinois denominated quasi-criminal in nature, but procedurally are treated as civil actions. *Village of Maywood* v. *Houston*, 10 Ill. 2d 117 (1957); *Village of Park Forest* v. *Bragg*, 38 Ill. 2d 225 (1967). Such a category of quasi-criminal actions has never been held by this Court to be improper.

California does not grant free transcripts to indigents in civil cases. California: Deering's Government Code, 69953. Neither does New York.

(5) Of the three California cases appellant cites (Appellant's Brief, p. 37) as granting free transcripts to indigents in municipal ordinance appeals, two concern appeals from convictions under state criminal statutes. *In re Henderson,* 61 Cal. 2d 541, 543, 393 P. 2d 685 (1964); *Preston* v. *Municipal Court,* 188 Cal. App. 2d 76 (1961). Only one of the California cases cited by appellant deals with a free transcript in an appeal from a municipal ordinance violation conviction. This is *Muller* v. *Municipal Court,* 259 Cal. App. 2d 177 (1968), in which the defendant had accumulated seven parking tickets. The court called these violations "misdemeanor parking violations" and stated (at 178), "In misdemeanor cases, . . . a transcript is furnished only to an appellant who is indigent and only when a transcript is necessary to an adequate and effective appellate review." Thereupon, the court denied Muller a free transcript because he had made no attempt to secure a settled statement of facts.

The instant appellant has not cited any California decision granting a free transcript to one convicted of a municipal ordinance violation.

(6) Furthermore, California strictly limits the giving of free transcripts to indigents appealing misdemeanor convictions by requiring the appellant to prove to the trial court that a settled statement of facts would be inadequate for appellate review. *People* v. *Goudeau,* 8 Cal. App. 3rd 275 (1970); Cal. Rules of Ct., Rules 184, 187.

(7) The most important New York statute the appellant cites (Appellant's Brief, p. 37) appears to be McKinney's Consolidated Laws of New York, Anno., Vol. 66, § 456 (1970-71 Supp.). The other New York statutory provisions cited serve only to embellish Section 456, which provides that "[i]n any case where the defendant is convicted of a crime or where after conviction defendant's

coram nobis application to vacate the judgment is denied or dismissed after a hearing at which testimony has been taken," two days after notice of appeal is filed, the clerk shall notify the "stenographer" thereof, and within 20 days thereafter the stenographer shall file, with the clerk two copies of a transcript of the stenographic minutes of the entire proceedings. The statute provides that the expense of the transcripts shall be a county or city charge, as the case may be, payable to the stenographer out of the court fund. The statute then states:

> "2. Upon the order of the trial judge or upon the order of any appellate court or judge and *upon such conditions as such trial judge or such appellate court or judge thereof may impose,* the clerk *without charge* shall furnish one of said transcripts to the defendant or his counsel." (Emphasis supplied.)

This section probably applies to appeals from municipal ordinance convictions, since Section 456 applies to all criminal cases and New York considers a municipal ordinance violation a misdemeanor.

However, none of the New York decisions cited in Appellant's Brief (p. 37) holds that one convicted of a municipal ordinance violation has a right to a free transcript; each of the cases he mentions involves violation of a state statute. *People* v. *Freeman*, 255 N. Y. S. 2d 563 (Seneca County Ct., 1965); *People* v. *Collins*, 239 N. Y. S. 2d 274 (Erie County Ct., 1963); *People* v. *Sporborg*, 292 N. Y. S. 2d 162 (Sup. Ct., App. Term., 1968).

It is noteworthy that Section 40 of the N. Y. C. Criminal Court Act states that misdemeanor trials will be conducted without juries. New York also allows appeals without a transcript. 66 McKinney's Consol. Laws of N. Y., Code of Criminal Procedure § 751; *People* v. *Giles*, 152 N. Y. 136, 140, 46 N. E. 326, 328 (1897).

(8) The final case cited in Appellant's Brief (p. 37) in this connection—*Tate* v. *United States,* App. D. C., 1966, 359 F. 2d 245 (1966)—dealt with the right to a transcript in an appeal from a conviction of possession of narcotics, not from conviction of a municipal ordinance violation. It is without relevance to the problem at hand.

(9) It seems significant in this connection that this Court in 1965 declined to review a decision of the Ohio Supreme Court which held that one convicted of an ordinance violation does not have a constitutional right to a free transcript on appeal. *Toledo* v. *Smith,* 3 Ohio St. 2d 80, 32 Ohio Ops. 2d 57, 209 N. E. 2d 410, cert. den. 383 U. S. 949, 16 L. Ed. 2d 211, 86 S. Ct. 1206 (1965). In *Toledo* v. *Smith,* the defendant was found guilty of being drunk and disorderly and resisting arrest. The defendant claimed he had a right to a bill of exceptions including a complete transcript at public expense because he was indigent. The trial court held that a narrative and not a stenographic report would be sufficient. In holding that the defendant had no right to a transcript at public expense, the Ohio Supreme Court reasoned that providing free transcripts would waste public funds on frivolous appeals. This Court denied certiorari without comment. 383 U. S. 949, 16 L. Ed. 2d 211, 86 S. C. T. 1206.

See also *Wright* v. *Crawford,* 401 S. W. 2d 47, 49 (Ky. App. 1966).

V.

APPELLANT HAS FAILED TO PROVE HIS NEED FOR A COMPLETE FREE TRANSCRIPT.

Appellant admits (Appellant's Brief, pp. 13, 14) that the rule of *Griffin* v. *Illinois,* 351 U. S. 12 (1956), does not require a State to "purchase a stenographer's transcript in every case where a defendant cannot buy it." As this Court there stated (at p. 20):

> "The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in cases [citing cases]. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and of appellate practice. [Citations.] We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

The concurring opinion of Mr. Justice Frankfurter in *Griffin* further observed (at p. 24):

> ". . . But in order to avoid or minimize abuse and waste, a state may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.
>
> ". . . It is not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion."

These considerations were amplified and particularized by this Court in *Draper* v. *Washington,* 372 U. S. 487, at 495, 496 (1963). We ask the Court's indulgence in our quoting from this discussion at some length:

> ". . . [W]e reaffirm the principle, declared by this Court in *Griffin,* that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U. S. at 20. Alternate methods of reporting trial proceedings are permissible

if they place before the appellate court an equivalent report of events at the trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, all or part of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. . . . If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the defendant with the means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions."

Appellant admits (Appellant's Brief, pp. 13, 14) that this is the law. But, unlike Mr. Justice Frankfurter, he attempts (Appellant's Brief, pp. 14-17) to minimize Illinois' right to prescribe the means of appellate review.

The Illinois Supreme Court has exercised its broad powers to provide means of affording adequate and effective appellate review to indigent defendants other than a

complete verbatim transcript. Rule 323 (c) of the Rules of the Illinois Supreme Court, as revised effective July 1, 1971, provides:

> "... If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 14 days after the notice of appeal is filed. Within 28 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify and order filed an accurate report of proceedings. ..."

The appellant has made no attempt to proceed in this alternative fashion. There is nothing in the record or in Appellant's Brief intimating that the appellant has sought to draft, as suggested by this Court's opinion in *Draper* v. *Washington*, 372 U. S. 487, at 495 (1963), "a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes."

Another alternative is afforded by Illinois Supreme Court Rule 323 (d), which permits the parties by written stipulation to "agree upon a statement of facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings". Appellant has made no attempt to work out an agreed statement of facts.

One of appellant's points on his appeal of his conviction (Appellant's Brief, p. 11) is his defense of "necessity". He claims that his admitted interference with the action of police, during a riot, while they were removing an injured person from a city street, was necessary, because he, a

medical student possessing some medical knowledge, surmised that doing so might result in more serious damage to the injured person. Surely a 400-page transcript (estimated, per Appellant's Brief (p. 9), to cost approximately $300 at 75¢ per page) is not required to present the simple point that the trial court erred in declining to give an instruction setting forth appellant's theory.

Another of appellant's contentions in his principal appeal (Appellant's Brief, p. 11) is that the prosecutor indulged in a sustained course of prejudicial misconduct. It would have been a simple matter for appellant's counsel, with the assistance of the court reporter, to pinpoint among the court reporter's untranscribed notes, those statements and actions of the prosecutor he considers prejudicial. The record and Appellant's Brief fail to indicate that this has been attempted.

Still another contention of the appellant in his principal appeal is that the evidence was insufficient to sustain his conviction. (Appellant's Brief, p. 12) But this Court specifically stated in *Draper* v. *Washington*, 372 U. S. 487, at 496 (1963), that if the assignments of error go to rulings on evidence or to its sufficiency, the transcript provided can be limited to the portions relevant to such issues and that "it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted." Appellants who have to pay for their transcripts usually do this. But the instant appellant has made no such attempt.

To sum up, appellant has not complied with the actual tenor of *Griffin* v. *Illinois* and *Draper* v. *Washington*. Assuming *arguendo* that these authorities are applicable to his case, he demands more than he would be entitled to under them. By asking too much and doing too little to

help himself, appellant has deprived the Illinois Supreme Court of a fair opportunity to vindicate his constitutional rights.

VI.

THE MECHANICAL JURISPRUDENCE OF "INDIGENCY" APPELLANT HERE EXPLOITS IS PATENTLY UNREALISTIC.

Appellant's affidavit of indigency (App. 26, 27) alleges that "[i]n the year preceding this application my income was $0.00", although it also states he is a medical student at the New York University School of Medicine, and "I have no other means of subsistence other than my parents who pay for my tuition and a New York State Regents Incentive Scholarship." The affidavit fails to indicate the economic status of his parents or how much they disburse to him. It also fails to deny the existence of bank accounts, investments, property, real and personal. The affidavit does not show his net worth.

In October, 1969, (App. 1)—that is, during the school year,—appellant found the time and the means to come from New York to Chicago in order to be a "'medical presence' (providing first aid assistance)" at a S. D. S. demonstration. (Appellant's Brief, p. 12.) He did this "under the aegis of the 'Medical Committee for Human Rights', a national organization of doctors and medical students devoted to humanitarian causes." (*id.*) He did this despite the fact that there are quite a few physicians in Chicago.

After his arrest, appellant certainly had a moral claim upon the Medical Committee for Human Rights and upon S. D. S. to aid him with his defense. S. D. S. is a nationally known protest organization. Certainly raising $300.00 to pay for appellant's transcript would be no great task for S. D. S.

At the trial, in the Illinois Supreme Court and in this Court, appellant has been and is represented without charge by the same able and zealous counsel. (Appellant's Brief, p. 5.)

Therefore, the disquisition in Appellant's Brief (p. 6) upon the "invidious discrimination" visited upon this appellant by the failure of the State to provide him with a trial transcript is distinctly artificial.

Appellant's argument sentimentalizes and falsifies the whole problem presented by this appeal. It dichotomizes the population into rich and poor, with no one in between. (See, for example, Appellant's Brief, p. 7.) Of course, in the real world, incomes cover a very broad range. Most persons have to earn their not abundant bread by labor more or less onerous. The working class—blue and white collar—makes up the majority. Most people would have to skimp, might even find it crippling, to pay for an extensive trial transcript. Yet appellant's argument lumps the working majority with the rich, who can purchase a transcript with ease.

In appellant's argument, any one who is willing to sign a *pro forma* affidavit of indigency automatically becomes an "indigent by definition" and thereby entitled, under the equal protection clause, to as good an appeal as a rich man. The result is a deprivation of equal protection to the working majority, who, when they appeal, must purchase their transcripts and legal service with hard earned money.

In any event, the claim of indigency by this particular appellant is contradicted by the fair implications from the record and from his own statement of facts (App. 26, 27; Appellant's Brief, p. 12). To provide a defendant with Mayer's resources with a 400-page transcript at public expense is ludicrous.

CONCLUSION.

The order of Illinois Supreme Court, denying appellant a free transcript for use in his appeal before that court, should be affirmed in its entirety.

Respectfully submitted,

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